SUPREME COURT OF THE UNITED STATES.

No. 161.—October Term, 1920.

Hartford Life Insurance Company, Plaintiff in Error, vs. Cecilia Blincoe, Administratrix of the Estate of Rosa Barber, Deceased.	In Error to the Supreme Court of the State of Missouri.

[February 28, 1921.]

Mr. Justice McKenna delivered the opinion of the Court.

This is the second writ of error in this case. The opinion upon the first writ is reported in 245 U. S. 146. The suit here is, as it was there, upon a certificate of qualified life insurance, issued to Frank Barber and payable at his death to his wife, the plaintiff, who has since died and her administratrix has been substituted as defendant in error.

The defense here is, as it was there, that Barber failed to pay the mortuary assessment levied January 29, 1910, known as quarterly call No. 126 and that the failure voided the policy by its terms.

In that case Mrs. Barber recovered judgment, which we reversed on the ground that in rendering it the State Court disregarded a judgment of a Connecticut court which had jurisdiction of the subject matter and the parties including Barber.

Upon the return of the case to the State Court a new trial was had that resulted again in a verdict and judgment for Mrs. Barber. They were affirmed by the Supreme Court of the State. 279 Mo. 318.

To that affirmance this writ of error is directed, and the question presented is, did the Supreme Court proceed in consonance with our decision. The extent of our decision is, therefore necessary to consider and what it directed. The determination is in the issue that was presented and passed upon.

By reference to the report of the case (245 U. S. 146) it will be seen that the Supreme Court rested the judgment reviewed on

the invalidity of the assessment and that the non-payment of the latter did not, upon two grounds, work a forfeiture of the insurance: (1) Under the condition of the funds of the Company the assessment was for a larger amount than was necessary to pay death losses; (2) The charter of the company required all its affairs to be managed and controlled by a board of not less than seven directors, and that the assessment was not levied by the board. These rulings we held to be "in the teeth of the Connecticut adjudication which held that it was proper and reasonable for the company to hold and even collect in advance in order to enable it to pay losses properly". It was hence decided that the trial court in rendering judgment against the Hartford Company, and the Supreme Court in affirming the judgment, did not give "full faith and credit to the Connecticut record." The reasons for the conclusion we need not repeat.

With this ruling the Supreme Court was confronted upon its reconsideration of the case and the freedom of decision that remained to it, and resolved that we had left untouched any consideration of the elements constituting the assessment. And that it was at liberty to decide, and decided, that a tax, asserted by the Company to have been imposed by the laws of Missouri, had been unlawfully included in the assessment and that, therefore, the assessment was void and its non-payment did not work a forfeiture of Barber's insurance. To the contention of the company that such holding was precluded by our opinion, it was replied that the matter presented purely a question arising under the laws of the State and that this court "did not intend by its judgment to adjudicate to the contrary."

The decision of the court that the Hartford Company was not subject to the tax that it had included in its assessment was not new. It was a repetition of the ruling made in *Northwestern Masonic Aid Association* v. *Waddill*, 138 Mo. 628, in 1897, and should have been known to the Hartford Life Ins. Company at the time it made the assessment and mortuary call. The ruling has been again repeated in *Young* v. *Hartford Company*, and upon the authority of those cases the court decided that the tax was not applicable to companies doing business on the assessment plan and that on that plan the Hartford Company was doing business.

The Hartford Company contests the latter ruling and as dependent upon it, the other ruling, that is, that the Company was not subject to the tax, and asserts besides that the effect of the inclusion of the tax in the assessment was presented to this court on the former writ of error and whether it was authorized by the Connecticut decree, and that the answers were in the affirmative. In other words passed upon the power to make and the elements that made the assessment. Counsel say "this court could not have held that this assessment was authorized by the Connecticut decree and at the same time hold that it was void because it included the fifteen cents' tax." To sustain this view of the case the opinion is quoted as follows: "It is obvious from the evidence that this assessment was levied in the usual way adopted by the company and tacitly sanctioned by the Connecticut judgment."

Counsel, however, admits that the question of the inclusion of the tax was not discussed, but insists that "the question was in the record, was necessarily involved, and was presented." And invokes the presumption that whatever was within the issue was decided. In other words, that the case was conclusive not only of all that was decided, but of all that might have been decided.

From our statement of the issues it is manifest that the quotation from the opinion has other explanation than counsel's, and we need not dwell upon the presumption invoked or the extent of its application in a proper case. The question of the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, or its effect upon a particular issue or question in some other case is not here involved. The most that can be said of any question that was decided is that it became the law of the case and as such binding on the Supreme Court of the State, and to what extent binding is explained in *Messenger* v. *Anderson*, 225 U. S. 436. Certainly omissions do not constitute a part of a decision and become the law of the case, nor does a contention of counsel not responded to. The element of taxes in the assessment was not considered by the Supreme Court and in this court the Connecticut judgment and its effect were the prominent and determining factors. The question of the inclusion of the tax was not discussed or even referred to. The only question considered was the powers given to the directors of the company by the Connecticut charter and the effect that was

to be assigned to the Connecticut judgment as that of a court having jurisdiction to decide what powers the charter conferred or required. It is hardly necessary to say that the tax law of Missouri was no part of the charter. It was a condition the company encountered and became subject to in Missouri.

It was urged, it is true, in the brief of counsel that the assessment "was void because it included money for taxes erroneously claimed to be enacted [exacted] under the laws of Missouri." No notice, however, was taken of the contention and no influence given to it or to the effect it asserted. If it made any impression at all it was obviously as a state question dependent upon the state statutes upon which we would naturally not anticipate the state courts, the case necessarily going back to them.

Nor may we judge of the action of the Supreme Court of the State upon the tax because of its size, nor yield to the contention of the company that it, the company, had not accepted the assessment plan of insurance but was doing business on the premium plan and, therefore, subject to the tax which it had included in the assessment. These are state questions and are not within our power to review.

It is further contended by the Hartford Company that the Supreme Court permitted the recovery of damages and attorney's fees under the provisions of a statute of the State although there was no evidence in support thereof except the delay in payment of the claim for insurance, notwithstanding, it is further said, the company "had prevailed on every issue that had theretofore been presented," and that by this action the Company was deprived of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

In support of its contention the Company cites Section 7068 of the Revised Statutes of Missouri which, it is said, authorizes such recovery only "if it appear from the evidence that such company [insurance company] has vexatiously refused to pay" loss under a policy, and no evidence was offered on either trial to show the existence of the condition prescribed by the statute. The immediate answer to the contention is that what the statute prescribed was for the courts of the State to determine and their

construction is not open to our review though we might consider its application to the circumstances of the case to be rather hard. And it would, we think, be extreme to hold that the statute or its construction is a violation of the Fourteenth Amendment.

Judgment affirmed.

Mr. Justice HOLMES, Mr. Justice VAN DEVANTER and Mr. Justice MCREYNOLDS, dissent

A true copy.

Test:

Clerk Supreme Court, U. S.